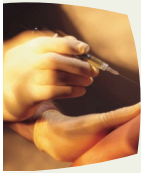




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# 3HR focus

## Sickness Absence and the New Fit Note

### Introduction

On 6 April 2010 the Med 3 sick note was replaced by the new 'Fit Note' or Statement of Fitness for Work. The Fit Note differs from its predecessor in that it allows doctors to suggest a return to work with appropriate adjustments made by the employer.

The Fit Note is designed to encourage the doctor to give advice on the functional limitations of the patient's condition and suggest simple things that might help a return to work. The Government guidance offered to doctors explains the goal of **dispelling the mistaken belief that employees have to be completely fit to return to work after sickness absence.**

The Government's guidance to doctors, clarifies the respective roles of the doctor, the employer and the employee: What the doctor completes on the statement is advice to the patient and is not binding on their employer. The purpose of the advice provided is to help the patient and their employer to explore ways of facilitating a return to work. In some cases this may not be possible and the patient will be treated as if they had been advised that they were not fit for work. In such a situation, patients are not required to return to their doctor for a new statement.

In all cases it is the employer's responsibility to carry out a risk assessment when an employee returns to work to ensure there is minimal risk to the employee and others in the workplace. It is not the doctor, but the employer, who is best placed to make the decision as to whether they can accommodate any changes to facilitate a return to work.

### How Fit Notes may affect sickness absence management

The new Fit Note contains an option for doctors to advise that an employee "may be fit for work taking account of the following advice". Where this applies to an employee, the doctor can tick one or more of four boxes to suggest common ways to facilitate a return to work, namely: a phased return to work, amended duties, altered hours and workplace adaptations. The doctor may also provide information on the functional effects of the employee's condition.

The introduction of the "may be fit for work" option is likely to have an impact on the way in which employers manage sickness absence in practice. While the Government guidance on Fit Notes stresses that the advice given on Fit Notes is not binding on employers, the fact that doctors can suggest changes to a job or workplace could create an area of conflict between the employer and employee as to how the return-to-work process should be managed.

### Not fit for work option

The Fit Note includes a "not fit for work" option. Sickness absence procedures are unlikely to be affected by the inclusion of this option on the note. The current sick note allows doctors to recommend that employees "refrain from work". The new "not fit for work" option reflects this.



### May be fit for work option

An employer that receives a Fit Note for an employee on which the doctor has ticked the "may be fit for work taking account of the following advice" option will need to take this into account in its dealings with the employee. It is important for the employer to have an open dialogue with him or her, at all times. The Fit Note is intended to enable doctors to provide information on which employers and employees can start a discussion about a possible return to work. It is not the final word on the matter.

The employer should review the Fit Note and consider the suggestions and comments made by the doctor and whether or not:

- it is possible to provide the support suggested by the doctor, bearing in mind what effect the suggestions will have on the employee's ability to do his or her job and the workplace generally;
- any other steps could be taken as an alternative, or in addition, to the doctor's suggestions, to facilitate a return to work; and
- the doctor's advice is consistent with industry or sector-specific guidelines or regulations relating to the employee's role, and if not, whether or not alternative support can be offered.

If appropriate, the employer should also discuss the proposed changes with occupational health, particularly if the employee's condition is complex or the role is particularly demanding, or where there are difficulties in reaching an agreement on the return to work. In appropriate cases the intervention of occupational health may be key to a successful return. Most GPs are not trained in occupational health practice and will have insufficient experience of the employee's role to be able to make an accurate assessment of what adjustments are appropriate. An occupational health practitioner is likely to be better placed to find the right solution for both the employer and the employee. The Government is piloting an occupational health advice line for small business until March 2011. The Government guidance for employers includes contact details for finding occupational health providers.

The advice on a Fit Note is not binding on employers and the employer can choose how to act on the advice given in the note. However, where the Fit Note relates to an employee who may have a disability under the Disability Discrimination Act [1995], the employer should be aware of its duty to make reasonable adjustments. This duty is unaffected by the advent of the Fit Note. If the employer declines, without good reason, to make an adjustment suggested on the Fit Note (or any other appropriate adjustment) that could enable the disabled employee to return to work, the employer may be in breach of its duty under the Disability Discrimination Act.

Employers should discuss the contents of the Fit Note and possible options with the employee with a view to agreeing a return-to-work plan, which should be documented. The return-to-work plan should include details of:

- when the employee is due to return to work;
- the adjustments that will be made;
- for how long the adjustments will remain in place and when they will be reviewed; and
- the effect of the adjustments, if any, on the employee's other terms and conditions (for example, where the employee is returning on reduced hours and a reduction in pay is agreed as a result).

Where changes have been made to an employee's role or working conditions, the employer should carry out a risk assessment to ensure that there is minimal risk to the employee and others in the

workplace. The Health and Safety Executive has published guidance on risk assessments (on its website). Where the employer and employee agree adaptations or adjustments that are different to those originally recommended on the Fit Note, it may be appropriate, as part of the risk assessment, for the employee to check with his or her doctor, or for the employer to check with occupational health, that the alternative arrangements are appropriate for him or her.

If adjustments aimed at a return to work are not possible, the employer should explain the reasons for this with the employee and treat the employee as if he or she is not fit for work. The employee will remain on sick leave and should continue to receive sick pay if it is due. The employer should agree a date with the employee to review the situation and ensure that this review takes place.

Employers should review their sickness absence management policies and procedures and update them as necessary to accommodate the introduction of Fit Notes (and consult on changes where necessary). It may be worthwhile for employers to include a statement in their policy to the effect that advice given on Fit Notes is not binding on the employer. Employers should also train managers on the new system and how to respond to Fit Notes.

### Summary

Although the Fit Note was broadly supported by the 147 respondents to the Government's consultation including employers' bodies and both occupational health (OH) doctors and nurses' representatives, early feedback reveals confusion about the legality, practicality and aims of the document among employers, HR and OH practitioners. The Fit Note's supporters acknowledge that it will take years to bring about the cultural shift in attitudes needed for the Fit Note to achieve its aims.

Many medical professionals are confident that doctors will embrace the new approach. They believe that by and large absence certification is more the employee's view of their fitness to return for work than the doctor's view, and very rarely will a doctor say to an employee who wants to go back to work that you shouldn't do so. Doctors generally have the competence to offer return-to-work advice. In many cases the advice is quite simple - for example; if somebody's rehabilitating after a hysterectomy or coronary artery bypass and in an office job, it makes sense that they return to work gradually and over a number of weeks.

Meanwhile, employment law experts are predicting conflict at work - for example, when an employee refuses to return to work even after adjustments are made and the employer must decide whether or not to dismiss the individual or stop paying statutory sick pay.

We can expect more awkward issues to be raised over the coming months, but there is broad agreement that the aims of the Fit Note can only be a good thing.

